

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>HARLAN E. MAY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>INSCO INDUSTRIES, INC.</b>	)	
Respondent	)	Docket No. 259,940
	)	
AND	)	
	)	
<b>ST. PAUL FIRE &amp; MARINE INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the March 14, 2003 Award entered by Administrative Law Judge (ALJ) Steven J. Howard. The Appeals Board (Board) heard oral argument on December 2, 2003.<sup>1</sup>

**APPEARANCES**

James E. Martin of Overland Park, Kansas, appeared for claimant. John D. Jurcyk of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. The record also contains a December 3, 2002 affidavit by attorney Michael H. Stang and the exhibit attached thereto which were introduced into the record by stipulation of the parties.

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<sup>1</sup>Oral argument was originally scheduled for August 15, 2003, but was continued at the request of claimant.

### ISSUES

Claimant alleges he injured his low back at work on December 30, 1999. The ALJ found "that claimant did not sustained [sic] an occupational accident." <sup>2</sup> Claimant seeks review of that finding.

Respondent contends claimant failed to prove that his low back injury was work related and further failed to prove that he gave timely notice of the alleged accident.

Accordingly, the issues for the Board's review are:

1. Whether claimant suffered personal injury by accident on December 30, 1999.
2. If so, did the accidental injury arise out of and in the course of claimant's employment with respondent?
3. Did claimant give timely notice of his accidental injury?

The parties agree that if this claim is compensable, that claimant is entitled to an award based upon a ten percent permanent partial general disability.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties arguments, the Board finds and concludes that the March 14, 2003 Award should be affirmed. The Board agrees with the analysis of the evidence and law as set forth in the Award and adopts the ALJ's findings, conclusions and orders as its own.

On December 30, 1999 claimant was working for INSCO as the foreman of a construction crew performing insulation work at the Sprint campus in Overland Park. Approximately 20 to 30 minutes before quitting time claimant:

[W]ent to go down the stairs and the stair was blocked with the scaffolding that belonged to the [s]heetrockers. And I was pulling a roll of insulation that I was taking down to the next floor on my way down. And as I was going through the scaffolding my right leg caught on a cord that was draped across the scaffolding that I didn't see and I went flying forward and I jammed my shoulder into the wall and fell flat on my face hanging over the stairs. And I went to get up after maybe 15 seconds or so, kind of got my bearing and

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<sup>2</sup> Award at 4.

stood up. As soon as I stood up I had a sharp pain in my back, lower back and I grabbed the rail to steady myself. And I stood there for maybe five or 10 seconds it seemed like and noticed that the pain lessened a little bit and I was able to slowly make my way downstairs to the plumber's shack.<sup>3</sup>

There were no witnesses to the accident. Claimant did not report the accident to anyone that day nor did claimant discuss the accident or injury with any of the members of his crew. When the work shift ended claimant and his crew caught a bus together. Claimant testified that because of his injury he was unable to keep up and after the entire crew had already boarded the bus he was still shuffling his way to the bus. He said it took him about twice as long to reach the bus as the other workers. Despite this, no one asked claimant what was the problem nor did claimant say anything about having suffered an injury.

Claimant's alleged accident occurred on a Thursday. Claimant was not scheduled to work again until the following Monday, January 3, 2000. On Saturday, January 1, 2000, claimant went to the emergency room at Independence Regional Health Center. Claimant did not report suffering an injury at work on December 30, 1999. Claimant was released the same day but returned to the hospital the next day and again on January 3, 2000 when he was admitted. He was subsequently transferred to St. Mary's Hospital where he eventually underwent surgery.

The emergency room department report dictated by Richard Whitaker, M.D., at the Independence Regional Health Center on January 2, 2000 contains the following history of present illness;

This is a 49 year-old white male who states that he has had a pinched nerve in the past and he has had intermittent exacerbations over the last two years for this. Most recent severe exacerbation was about 3 years ago and says that tonight he has had a cold and flu and had been coughing approximately 24 hours ago and then woke up during the night after coughing with pain typical of his pinched nerve. The pain is in the right hip and does radiate down his leg in a sciatic distribution. He denies any bowel or bladder symptoms or saddle paresthesias. He denies any other trauma to the back and has tried over the counter medications without relief. He called the pain clinic and they told him that they could not see him over the weekend and that if he needed help to come in to the Emergency Room.<sup>4</sup>

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<sup>3</sup> R.H. Trans. at 7.

<sup>4</sup> Whitaker Depo. Ex. 1.

Claimant's wife called his work on January 3, 2000, to report that claimant was in the hospital. There is no evidence that she reported claimant was there for a work related injury.

The history and physical report prepared by Daniel M. Downs, M.D., on January 9, 2000 at St. Mary's Hospital of Blue Springs, Missouri relates this history of present illness;

Mr. May is having severe right leg pain since around the first of the year. He woke up in the morning and doesn't remember any traumatic events that led to the severe pain in the leg. He wasn't able to move around and subsequently has been fighting the severe back and right leg pain. He had an MRI done at Independence Regional Health Center, though Dr. Jones was on staff at that facility but when he found out after he had the MRI which shows a very large extruded disk fragment at L3-4, affected a transfer so that he could be treated by Dr. Jones here at St. Mary's Hospital at Blue Springs. He would benefit from discectomy because of the size of the extruded disk fragment and the persistent leg pain, loss of right knee reflex and quadriceps strength. This gentlemen has lost 150 lb[s] with weight loss diet over the last 14-18 months. He has had no bowel or bladder problems. He has been actively exercising, a lot of biking, doing most of the things that would be considered correct for his back but this had this had [sic] this [sic] event that led to the herniated disk. He also has had some chronic back pain which is consistent with the MRI scan showing a degenerative disk at 4-5. <sup>5</sup>

On January 10, 2000 claimant asked the business agent for his Union, Norman VanBebber, to call his employer to report that his condition was work related. However, there is no indication that claimant told Mr. VanBebber the date of his accident nor is there any evidence that Mr. VanBebber related an accident date to claimant's employer.

On January 20, 2000, claimant completed a questionnaire at his doctor's office. In response to the question of date of accident, claimant wrote January 1, 2000. When asked "where did it happen?" Claimant answered "home" and in response to the question "how did it happen?" claimant wrote "who knows." <sup>6</sup>

On January 21, 2000, claimant completed an accident report at his employer's office. On that accident report form, claimant wrote that his accident occurred in July 1999.<sup>7</sup>

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<sup>5</sup> Downs Depo. Ex. 1.

<sup>6</sup>R.H. Trans., Resp. Ex. A.

<sup>7</sup>R.H. Trans., Resp. Ex. B.

The earliest written documents in the record that reference or allege an accident date of December 30, 1999 are the form K-WC E-1 Application for Hearing dated October 25, 2000 and filed with the Kansas Division of Workers Compensation on October 30, 2000, and the October 25, 2000 letter by claimant's counsel to respondent.<sup>8</sup>

The Board finds claimant has failed to prove he suffered an accident and injury at work on December 30, 1999.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated March 14, 2003 should be and is hereby affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant  
John D. Jurcyk, Attorney for Respondent and St. Paul Fire & Marine Ins. Co.  
Steven J. Howard, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>8</sup> May Depo. Ex.1.